UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

JTH TAX, INC. d/b/a LIBERTY TAX SERVICE	:	
Plaintiff/ Counter-Defendant	:	
vs.	:	Civil No. 2:07CV170
KENYA WHITAKER, et al.	:	
Defendants/ Counterclaimants	:	

OPPOSITION TO JTH TAX, INC.'S MOTION TO DISMISS

Defendants/Counterclaimants Kenya Whitaker and Easy Software Solutions, LLC ("ESS"), by counsel, hereby file their Opposition to JTH Tax, Inc. d/b/a Liberty Tax Service's Motion to Dismiss Counts III and V[1] of the Counterclaim and in support state as follows:

Liberty argues that the Court should dismiss Count III of the Counterclaim because Virginia does not recognize the tort of negligent misrepresentation. However, Virginia does recognize claims for constructive fraud. In fact, the Virginia Supreme court has held that "the essence of constructive fraud is negligent misrepresentation." *Richmond Metropolitan Authority v. McDevitt Street Bovis, Inc.,* 256 Va. 553, 559 (1998). Moreover, the elements for each cause of action are identical. Constructive fraud, like negligent misrepresentation, requires a plaintiff to show "that a false representation of a material fact was made innocently or negligently, and the injured party was damaged as a result of ... reliance upon the misrepresentation." *Mortarino v. Consultant Engineering Services, Inc.*, 251 Va. 289, 295, 467 S.E.2d 778 (1996). Whitaker and ESS allege

[1] In its Motion to Dismiss, Liberty refers to Count IV as the claim for Breach of Implied Covenant of Good Faith and Fair Dealing when in fact that claim appears as Count V of the Counterclaim.

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that Liberty made false representations of material fact on which they relied to their detriment. Therefore, should the Court determine that Whitaker and ESS have failed to state a claim recognized by Virginia law, we respectfully request that they be allowed to amend their Counterclaim so as to replace negligent misrepresentation with constructive fraud.

As to Count V, Whitaker and ESS voluntarily dismiss the claim for Breach of the Implied Covenant of Good Faith and Fair Dealing, acknowledging that Virginia law imposes upon Liberty a duty of good faith and fair dealing in its performance of the franchise agreement and its enforcement.

WHEREFORE, Defendants/Counterclaimants Kenya Whitaker and Easy Software Solutions, LLC respectfully request that the Court deny Liberty's Motion to Dismiss as to Count III (Negligent Misrepresentation) or in the alternative allow Whitaker and ESS to amend their Counterclaim to plead constructive fraud.

KENYA WHITAKER
EASY SOFTWARE SOLUTIONS, LLC

By: /s/ Dennis J. Quinn
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 31st day of August, 2007, I will electronically file the foregoing with the Clerk of Court using the CM/ECF system, which will then send a notification of such filing (NEF) to the following:

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